NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Extreme Building Services Corp. and Emil Braun, its guarantor *and* Local 78, Asbestos Lead and Hazardous Waste Union, Laborers International Union of North America, AFL-CIO. Cases 29–CA-24894, 29–CA-25007, 29–CA-25082

April 29, 2009

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. On April 30, 2007, the National Labor Relations Board issued a Decision and Order<sup>1</sup> that, inter alia, directed Respondent Extreme Building Services Corp. to make whole five discriminatees for the loss of earnings and other benefits resulting from their discharges in violation of Section 8(a)(3) and (1) of the Act.

On July 30, 2008, the Regional Director approved a settlement agreement, executed by all parties, resolving the amount of backpay due to the discriminatees<sup>2</sup> under the Board's Order. Pursuant to the terms of the settlement agreement, the Respondents agreed to pay the discriminatees a total of \$65,519, which represented \$46,000 in backpay, \$3519 in Employer F.I.C.A. and Medicare contributions, and \$16,000 in interest due at the time of the settlement agreement.<sup>3</sup> The amounts due were to be paid in two installments of \$32,759.50. The settlement agreement also contained the following provisions:

1. Respondent hereby waives its rights under Sections 10(e) and (f) of the National Labor Relations Act (29 U.S.C. 160(e) and (f)) to contest either the propriety of the Board's Order issued on April 30, 2007 or the findings of fact and conclusions of law underlying that Order.

. . . .

5. (a) If either installment payment is not received in the Board's Treasury account on or before

<sup>1</sup> 349 NLRB 914 (2007).

the dates set forth in paragraph 4 above, Respondent shall be in default. In such an event, the Regional Director, or his designated agent, shall provide Respondent by facsimile transmission with written notice providing it with seven (7) calendar days to cure such default. It shall be addressed to [the Respondents' attorney].

. . . .

- (c) If, within the seven (7) calendar day default cure period, the delinquent amount owed under the terms of this Stipulation is not received in the Board's Treasury account, the Regional Director for Region 29, in his discretion, may declare, by written notice served upon [the Respondent's attorney], in the manner set forth in paragraph 5(a), that the full unpaid portion of the remaining indebtedness is immediately due and payable. Such notice will specifically state the final date, seven (7) calendar days from the date of the notice, that the accelerated-payment must be received.
- (d) Upon expiration of the accelerated-payment period, if Respondent has failed to make payment of the full unpaid balance owed under this Stipulation, the Respondent will be required to pay the Board interest on this amount from the date this Stipulation is approved by the Regional Director until the date that full payment is received, computed at the rate of 12% annually, or in accordance with the formulas set forth in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987), whichever is greater.
- 6. In the absence of full payment of the \$65,519, and, if applicable, additional interest thereon, the General Counsel may, upon the expiration of the accelerated-payment period, without further notice, issue a Compliance Specification and Notice of Hearing ("the Specification"), alleging total net backpay of \$74,187.07 on behalf of discriminatees Betsy Arruda, Maria Ortega, Andrzej Siemek and Jerzy Sokol, plus accrued interest as set forth in paragraph 5(d) and reduced by any payment(s) received from the Respondent pursuant to the installment payment provision of this Stipulation, . . . . 4 The Respondent understands and agrees that the allegations of the Specification, as described in this paragraph, may be deemed to be true by the Board, that it will not contest the validity of any such allegations, and the Board may enter findings of fact,

<sup>&</sup>lt;sup>2</sup> Although five discriminatees were included in the make-whole remedy in the Board's Order, only four of the five individuals are named in the settlement agreement, compliance specification, and Motion for Summary Judgment.

<sup>&</sup>lt;sup>3</sup> Respondent Emil Braun, though not listed as a Respondent in the Board's original Decision and Order, signed the settlement agreement, pursuant to which he agreed to personally pay the balance owed under the settlement agreement in the event of an uncured default by Respondent Extreme Building Services Corp.

<sup>&</sup>lt;sup>4</sup> Although it appears that some additional material was omitted from the copy of the settlement agreement that the General Counsel submitted with his Motion for Summary Judgment, the language quoted above is sufficient to enable the Board to grant the appropriate remedy.

conclusions of law, and a Supplemental Order on the allegations of the aforementioned Specification. On receipt of said Motion for Summary Judgment, the Board shall issue an Order requiring the Respondent to show cause why said Motion of the General Counsel should not be granted. The only issues that may be raised in response to the Board's Order to Show Cause are whether the Respondent defaulted upon the terms of this Stipulation, whether it received the required notice(s) to cure its default(s), and whether a proper setoff has been credited for payments already received by the Board. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Specification to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Respondent, on all issues raised by the pleadings. The Board may then issue a Supplemental Order providing for payment by the Respondent of a minimum net backpay of \$74,187.07, plus accrued interest as set forth in paragraph 5(d), less any payment already deposited with the Board, and the applicable Employer F.I.C.A. and Medicare contributions. The parties further agree that the Board's Supplemental Order may be entered upon application by the Board to the appropriate United States Court of Appeals for enforcement of the Board's Supplemental Order. The only issues that Respondent may raise in response to the Board's application to the appropriate United States Court of Appeals are whether it received the required notice(s) to cure its default(s), and the amount of payments Respondent has already deposited with the Board.

7. If the Regional Director elects to file a Motion for Summary Judgment, Respondent agrees to reimburse the Board for all reasonable costs and attorneys' fees incurred by the Board, at the prevailing market rate, in connection with the prosecution of that action.

The Respondents failed to make the second installment payment required by the terms of the settlement agreement, which was due on December 10, 2008. On December 17, 2008, the Regional Director granted the Respondents an extension of time to make the past-due installment payment, and he agreed to modify the settlement agreement by permitting the remaining payment to be paid in two additional installments due January 12 and February 10, 2009, respectively. By letters dated January

ary 14 and 22, 2009, the Regional Director notified the Respondents that they were in default of the settlement agreement and had failed to cure the default within 7 days, and he reminded the Respondents of the consequences of default, as specified in the settlement agreement. The Regional Director also gave the Respondents an additional 7 days, until January 29, 2009, to cure the default. Although the Respondents made a \$5000 payment to the Board on February 10, 2009, 6 the Respondents have failed to make the remaining payments due pursuant to the modified settlement agreement.

On February 25, 2009, the Regional Director for Region 29 issued a compliance specification alleging the amount due under the Board's Order, pursuant to the noncompliance provisions of the settlement agreement. Also on February 25, 2009, the General Counsel filed with the Board a Motion for Summary Judgment, with exhibits attached. On March 9, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response. The allegations in the motion and in the compliance specification are therefore undisputed.

Ruling on the Motion for Summary Judgment<sup>8</sup>

According to the uncontroverted allegations of the Motion for Summary Judgment, the Respondents have breached the terms of the settlement agreement by failing to make the second installment payment required by the settlement agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the entire backpay amount of \$74,187.07, plus interest and applicable Employer F.I.C.A. and Medicare contributions, plus reasonable costs and attorneys' fees as described in the settlement agreement, is immediately due, less any payments already deposited with the Board<sup>9</sup> and tax withholdings required by Federal and State laws.<sup>10</sup> Accordingly, we

<sup>&</sup>lt;sup>5</sup> By letter to the Respondents' attorney dated December 22, 2008, counsel for the General Counsel confirmed the attorney's statement that Braun agreed to comply with these conditions.

<sup>&</sup>lt;sup>6</sup> The compliance specification (discussed below) indicates that this \$5000 was allocated entirely to backpay.

<sup>&</sup>lt;sup>7</sup> This Notice to Show Cause corrected an error in the Notice to Show Cause dated March 4, 2009.

<sup>&</sup>lt;sup>8</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

These payments already deposited with the Board are \$28,000 (backpay), \$1759.50 (Employer F.I.C.A. and Medicare contributions), and \$8000 (interest).

<sup>&</sup>lt;sup>10</sup> See Tom Cat Development Corp., 340 NLRB 193 (2003).

grant the General Counsel's Motion for Summary Judgment, and we will order the Respondents to pay the amounts specified in the settlement agreement and compliance specification.

## **ORDER**

The National Labor Relations Board orders that the Respondent, Extreme Building Services Corp., Great Neck, New York, its officers, agents, successors, and assigns, and Emil Braun, its guarantor, shall make whole Betsy Arruda, Maria Ortega, Andrej Siemak, and Jerzy Sokol, by paying to the Board, on behalf of those individuals, the outstanding amounts of \$74,187.07 in backpay and \$16,000 in interest through July 30, 2008, plus additional interest accrued on the unpaid balance of net backpay owed until the date of payment, at the rate of 12 percent annually or in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), which-

ever is greater, plus applicable Employer F.I.C.A. and Medicare contributions, plus reasonable costs and attorneys' fees as described in the settlement agreement, minus the amounts already paid to the Board, and minus tax withholdings required by Federal and State laws.

TOTAL BACKPAY DUE: \$46,187.07 Dated, Washington, D.C. April 29, 2009

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD